Opinion No. 63-04

January 25, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Hon. James C. Compton District Attorney Ninth Judicial District Portales, New Mexico

QUESTION

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1. Are pool halls, billiard halls, and bowling alleys within the restriction of § 40-44-1 to § 40-44-5, N.M.S.A., 1953 Compilation which prohibit certain activities on Sunday?

CONCLUSION

1. No, so long as such activities are conducted in a proper manner, free from rowdyism, gambling and immorality.

OPINION

*{*7}* **ANALYSIS**

In answering your question, we deem it helpful to set out the applicable portion of the Act below:

§ 40-44-2. Activities prohibited -- Exemptions -- Penalty. -Any person or persons who shall be found on the first day of the week, called Sunday, engaged in any sports, or in horse racing, cock fighting, or in any other manner disturbing any worshiping assembly or private family, or attending any public meeting, or public exhibition, excepting for religious worship or instruction, or engaged in any labor, except works of necessity, charity or mercy, shall be punished by a fine not exceeding fifteen dollars ($ 15.00), *{*8}* nor less than five dollars ($ 5.00), or imprisonment in the county jail of not more than fifteen (15) days, nor less than five (5) days, in the discretion of the court upon conviction before any district court."

As can be readily seen, this statute of territorial origin and last amended in 1887, is somewhat obscurely drawn. In fact, we are somewhat surprised that it has not been attacked as void for vagueness.

Nevertheless, our Supreme Court has, on three occasions, construed the Act.

In the early case of **Cortesy v. Territory,** 6 N.M. 682, So. Pac. 947, sale of liquor was held to be "labor" and prohibited on Sunday. The tenor of the opinion is a decidedly

moral one and we do not doubt that the result was largely influenced by the nature of the activity involved. However, there is rather sweeping language in the opinion indicating that almost any activity would be considered labor within the statute.

The next New Mexico case narrowed considerably the implications of **Cortesy v. Territory,** supra, and applied the canon of strict construction with fervor. In **Territory v. Davenport,** 17 N.M. 214, 124 Pac. 795, at page 217 and 218, Justice Hanna said:

"Penal statutes are to be strictly construed and the courts all uniformly so hold. **Hence we must give to the statute now under consideration a strict construction, according to its letter, and nothing must be regarded as being included within it, that is not both within the letter and spirit of the statute. . .** The above statute is peculiarly worded and from our research we have been unable to find a similar statute in any other state. Its meaning and intent are not clear and it is very ambiguous. The Legislature of New Mexico should enact a statute upon Sunday observance that would plainly express the prohibited acts, so that the people would be able to know, without construction by the courts, what it was intended to prohibit. Courts cannot enact laws and are limited simply to their construction and interpretation, and under well defined rules."

He then declared that baseball, America's counterpart to Great Britain's cricket, was neither labor nor sport prohibited by New Mexico Sunday laws.

The most recent case concerning Sections 40-44-1, et seq. is **State v. Hardwicke,** 35 N.M. 387, 1 P. 2d. 974 which decided that operating a movie is neither labor nor sport within the statute. The virtues of movies are extolled at length in the opinion. The Court also mentions the enactment of an exemption for movies, (not applicable to the case decided) which can be presently found in § 40-44-3, N.M.S.A., 1953 Compilation.

A common thread in all three cases is a tendency to characterize the activity in question as either wholesome and beneficial or immoral.

In **Territory v. Davenport,** supra, the Court said:

"We think the law makers, by the use of the words 'horse racing or cock fighting' pointed out the class of sports which they intended to prohibit, and that they **intended to prohibit only such sport as** tended to immorality. It is well known that horse racing and cock fighting, by reason of the fact that a purse is usually paid to the owner of the winner, and that gambling and betting sometimes attend *{*9}* such sports, are generally considered immoral. Ex parte Hull (Idaho) 110 Pac. 256."

And later, at page 219, it was held:

"We therefore hold that baseball, so long as it is conducted and carried on in a harmless and proper manner, free from rowdyism, gambling and immorality, does not come within sports prohibited by the statute."

We now turn to the question posed by you and inquire if pool, billiards and bowling are prohibited sports under the rule set out in **Territory v. Davenport,** supra. To so hold would require us to declare as a matter of law that such activities encourage immorality or are generally attended by gambling and rowdyism.

We would be hard pressed to discover a basis for declaring this kind of recreation generally immoral. Women and children frequent bowling alleys and surely their participation in leagues and lessons is not sin! Boys Clubs, Y.M.C.A.'s, as well as bowling alleys, often provide pool or billiard tables as part of their recreational program. We cannot say that they are encouraging immorality thereby. We are, therefore, of the opinion that the activities of bowling, and playing pool do not in themselves encourage immorality, and cannot be declared illegal on Sunday on that basis. See annotation, Sports and Games on Sunday, 24 A.L.R. 2d. 813.

We now turn to the somewhat more serious problem of whether such activities encourage gambling. Section 40-22-1, N.M.S.A., 1953 Compilation, declares gambling illegal and we cannot presume that a large portion of our population is breaking the criminal law.

As noted above in **Territory v. Davenport,** supra, the Court qualified its blessing on baseball by the words "so long as it is conducted free from gambling, immorality, and rowdyism." This is a factual problem that should be resolved on a specific basis in regard to a specific establishment. We rather doubt that bowling and billiard establishments are generally the dens of inequity reputed of yore. However, should an establishment come to your attention that does meet this test, it cannot operate legally on Sunday.

Much of what has already been said applies with equal force to the question of whether these activities are **labor** within the meaning of § 40-44-2, supra. The cases of **State v. Hardwicke,** supra, and **Territory v. Davenport,** supra, decided "labor" means physical toil, and not baseball or movies. Attorney General Opinion No. 1320, 1914, which somewhat reluctantly determined that pool halls were illegal on Sunday was decided prior to the **Hardwicke** case, upon which we now rely, and is expressly overruled.

In conclusion, we are of the opinion that bowling and pool are not labor within § 40-44-2 nor can we declare them immoral or conducive to gambling as a matter of law and therefore "sports" within the prohibition. So long as these activities are conducted free of rowdyism, gambling or immorality, they are permissible on Sunday.

In view of our disposition of your question, we do not pause to inquire whether New Mexico Sunday Laws, characterized in **Cortesy v. Territory,** supra, as religious measures, are valid under **McGowan v. Maryland,** 366 U.S. 420, (1961), 81 S. Ct. 1101, 6 L. Ed. 2d. 393 and companion cases. These cases upheld the Sunday laws of three states over First and Fourteenth amendment objections, emphasizing the secular features and purposes of such *{*10}* laws.

We trust this opinion will be of assistance to your office.

By: Shirley C. Zabel

Assistant Attorney General